IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

FRANK L. SMITH, CICERO J. LINDLY, HAL W. TROVILLION, WILLIAM J. SMITH, P. H. MOYNIHAN, EDWARD H. WRIGHT, and WILLIAM BURKHARDT, the persons constituting the Illinois Commerce Commission of the State of Illinois, and OSCAR E. CARLSTROM, Attorney General of the State of Illinois,
Appellants,
VS.
ILLINOIS BELL TELEPHONE COMPANY, A Corporation,
Appellee.
No. 193. (30,677)

FRANK L. SMITH, CICERO J. LINDLY, HAL W. TROVILLION, WILLIAM J. SMITH, P. H. MOYNIHAN, EDWARD H. WRIGHT, and WILLIAM BURKHARDT, the persons constituting the Illinois Commerce Commission of the State of Illinois, and OSCAR E. CARLSTROM, Attorney General of the State of Illinois,
Appellants,
VS.
ILLINOIS BELL TELEPHONE COMPANY, A Corporation,
Appellee.
No. 670 (31,393)

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

BRIEF AND ARGUMENT FOR APPELLANTS.

OSCAR E. CARLSTROM,
Attorney General of the State of Illinois.
HARRY C. HEYL,
Counsel for Appellants.
R. H. RADLEY, and
S. F. McGRATH, of Counsel.

Counsel for Appellants intend to argue this case orally.

Bush Printing Co. Peoria, Illinois.

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INDEX OF CASES.

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STATEMENT OF JURISDICTIONAL GROUNDS.

MAY IT PLEASE THE COURT:

The appellee in this case relies upon that part of Section 24 of the Judicial Code (Federal Statutes Annotated, Volume 4, Page 838) for jurisdiction of the District Court, which provides that the District Court shall have original jurisdiction, "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of THREE THOUSAND ($3000.00) DOLLARS, and arises under the Constitution or Laws of the United States." (R. 2.)

Appeal No. 193 is an appeal from the order entered July 30th, 1924, by the Statutory Court, granting an interlocutory

injunction (R. 30-31) and the jurisdiction of this court is based upon Section 266 of the Judicial Code (Vol. 5 Federal Statutes Annotated, Page 983) which provides that an appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction.

Appeal No. 670 is an appeal from an order overruling the motion of appellants to dismiss the bill of complaint and from the final decree entered in said cause on May 12, 1925 (R. 32-33). The jurisdiction of this Court is invoked under Section 238 of the Judicial Code (Vol. 5, Federal Statutes Annotated, Page 794) on the grounds that it involves the application of the laws and constitution of the United States.

On December 14th, 1925, on motion of appellee, appeal No. 670 was advanced for hearing with appeal No. 193.

STATEMENT OF THE CASE.

This suit is brought for the purpose of restraining the members of the Illinois Commerce Commission, an administrative body under the statutes of the State of Illinois, and the Attorney General of Illinois (R. 1-2) from enforcing the collection by the appellee of rates and charges for telephone exchange service to its subscribers and patrons within the City of Peoria, and the Villages of Averyville, Bartonville, East Peoria and vicinity, in the State of Illinois, and referred to as Rate Schedule I. P. U. C. 1, hereinafter called schedule 1, and to further restrain said appellants from collecting or attempting to collect any penalties, fines, or forfeitures, either under any statute or otherwise, by reason of the charging and collection

by the appellee of higher rates and charges for telephone service than in schedule 1 specified (R. 2), on the grounds that the rates under which appellee is limited by the Commerce Commission, being schedule 1, are confiscatory, and that to compel appellee to continue charging said rates deprives appellee of its property without due process of law, and denies appellee the equal protection of the laws in violation of its rights under the Fourteenth Amendment to the Constitution of the United States (R. 2).

The Central Union Telephone Company, predecessor of appellee, filed a revised schedule of rates, known as I. P. U. C. 1, on July 22, 1919, covering telephone service in Peoria, and vicinity, which schedule it proposed to make effective August 1st, 1919 (R. 10). The Public Utilities Commission of Illinois, now Illinois Commerce Commission, suspended the effective date of this rate schedule until December 20th, 1919, and on November 28th, 1919, the Commission approved an order authorizing this schedule to become effective temporarily until January 31st, 1920, and subsequently entered supplemental orders extending the effective period of the proposed rates pending completion of the necessary investigation (R. 10).

On or about April 1st, 1920, said Central Union Telephone Company, predecessor of appellee, prior to a final disposition of schedule 1, filed with the Public Utilities Commission of Illinois a schedule of rates for telephone service applying to the Peoria Exchange effective May 1st, 1920, designated as Illinois Public Utilities Commission No. 2, cancelling Illinois Public Utilities Commission No. 1; and on the 19th day of April, 1920, the Commission entered an order suspending the effective

date of said schedule 2 until August 29th, 1920. On July 31st, 1920, the Commission entered an order finding that the schedule of rates known as I. P. U. C. 1 was just and reasonable and should be approved, and ordering that the Central Union Telephone Company be permitted and authorized to place into effect said rates on August 1st, 1920 (R. 13). No rate schedule has ever been filed by the utility since this order.

The Commission, after suspending schedule 2, from time to time and after holding a number of hearings thereon, entered an order on October 31st, 1921, permanently suspending schedule 2 (R. 14).

Appellee perfected and prosecuted an appeal to the Circuit Court of Peoria County, from the order of the Commission permanently suspending schedule 2, which appeal was determined on April 6th, 1922, reversing said order of October 31st, 1921 (R. 4). This order is not set out in the bill or exhibits, and the reason for the action of the Circuit Court is therefore unknown.

After this, several hearings were held by the Commission, in which evidence was introduced by appellee, the last hearing being on September 13th, 1922 (R. 4).

On the 16th day of September, 1922, appellee filed with the Commission a motion requesting the Commission to make effective a temporary schedule of rates pending the entry of the final order in said cause (R. 4), but no schedule of rates was filed by the Company with such request or showing made as required by the Public Utility Law of Illinois (Sec. 36 appendix).

On September 28th, 1922, the Commission denied without prejudice the motion of the appellee, filed September 16, 1922, for a temporary order establishing a temporary rate on less than thirty days' notice (R. 15-16).

From the date of the order denying the motion, September 28, 1922, to the date of the filing of the bill of complaint herein, July 18, 1924, a period of nearly two years, the appellee did nothing to press its hearing before the Commission except to write a letter on July 5th, 1923, requesting that the case be set for hearing at as early a date as possible. During all this time the matter was permitted by the appellee to lie dormant without any objection except the writing of this single letter. On June 18th, 1924, a little over one year after the letter requesting the Commission to fix a date for a hearing, had been written, appellee filed its bill of complaint in the United States District Court for the Southern District of Illinois, Southern Division (R. 1), and obtained a temporary restraining order on the bill and exhibits attached thereto on the same date.

On July 30, 1924, an interlocutory injunction was issued by the Statutory Court, and an appeal was perfected from said order which has been referred to as appeal No. 193 (R. 30-31).

Thereafter, on May 11, 1925, appellants filed an amended motion to dismiss the bill of complaint (R. 30-31-32, No. 670), and the Court overruled the said motion and entered a final decree in said cause granting the relief prayed (R. 32-33, No. 670). Appellants perfected an appeal from the order overruling their motion and from the final decree which has been referred to as Appeal No. 670 (R. 32-33).

ASSIGNMENT OF ERRORS.

Appellants urge the following errors for a reversal of the orders entered in said cause:

I.

1. The District Court erred in taking jurisdiction of this case.

2. The District Court erred in holding that the allegations in the Bill of Complaint showed that the appellee or its predecessor, has exhausted its legislative remedies under the laws of the State of Illinois.

3. The Bill of Complaint herein shows that the appellee, or its predecessor, did not exhaust its legislative remedies. under the laws of the State of Illinois.

4. The District Court had no jurisdiction of this case, for the reason that it was not shown that the State of Illinois was confiscating, had confiscated, or was about to confiscate the property of the appellee, in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The Court erred in overruling the motion of appellants to dismiss the Bill of Complaint.

II.

6. The Court erred in granting the interlocutory injunction and the right to the appellee to increase its rates, as provided in said order.

7. The Court erred in entering the final decree and granting the perpetual injunction against the appellants.

8. The Court erred in decreeing that the appellants, and each of them, and all other persons, be permanently restrained and enjoined from taking any steps or proceedings against appellee, its officers, agents or employes, to enforce any penalties, fines, forfeitures, or other remedy, either under any statute or otherwise, by reason of charging or collecting higher rates, than those in Schedule of Rates, I. P. U. C. 1.

9. The Court erred in entering the final decree herein whereby fifteen thousand or more subscribers of

appellee, who were affected by the increase of rates, and who were not made parties to this suit, were enjoined from instituting or prosecuting any proceedings or taking any steps with reference to protecting their rights in connection with the increase of rates.

ARGUMENT.

I.

THE BILL OF COMPLAINT AND EXHIBITS SHOW THAT APPELLEE HAS NOT EXHAUSTED ITS LEGISLATIVE REMEDIES UNDER THE LAWS OF THE STATE OF ILLINOIS, AND, THEREFORE, THE DISTRICT COURT OF THE UNITED STATES SHOULD NOT HAVE TAKEN JURISDICTION OF THIS CASE.

Hurd's Revised Statutes of the State of Illinois, 1917, Chapter 111A, Section 36, Paragraph 36.

Hurd's Revised Statutes of the State of Illinois, 1917, Chapter 111A, Section 67, Paragraph 67.

Cahill's Revised Statutes of the State of Illinois, 1921, Chapter 111A, Section 36.

Cahill's Revised Statutes of the State of Illinois, 1921, Chapter 111A, Section 88.

Prentis vs. *Atlantic Coast Line Company*, 211 *U. S.* 210.

Bacon vs. *Rutland Railroad Company*, 232 *U. S.* 134

Mellon Company vs. *Charles McCafferty, as County Treasurer, et. al.*, 239 *U. S.* 134.

Wisconsin-Minnesota Light & Power Co. vs. *Railroad Commission*, 267 *Fed.* 711.

Cumberland Tel. & Tel. Co. vs. *Railroad and P. U. Commission*, 287 *Fed.* 406.

There is no allegation in the bill of complaint that either the Public Utility Act of the State of Illinois, in force January 1, 1914, or the Act as revised and amended which went in force July 1, 1921, is unconstitutional, and appellants will proceed in this argument on the theory that both of said Acts are valid and binding on appellee. The only authority for jurisdiction is that there is more than Three Thousand ($3000.00) Dollars involved in this case, exclusive of interest and costs, and that the subject matter arises under the Laws or Constitution of the United States. In order to invoke the aid of the Federal Court, appellee must allege sufficient facts, and not mere conclusions, that will bring it within the protection afforded by the Fourteenth Amendment to the Constitution of the United States.

The Public Utility Law of Illinois went into effect January 1, 1914, and those sections, which appellants rely upon to sustain their first contention, and which were in force in 1919 and 1920, are set out in full in the appendix hereto.

This Act was amended and revised by an Act of the Legislature of Illinois which went into effect July 1, 1921, and section 36 of the new law differed in no material respect from section 36 of the old law, except the following paragraph was omitted from the new law:

> "No public utility shall increase any rate or other charge, or so alter any classification, contract, practice, rule or regulation as to result in any increase in any rate, or other charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified."

Section 88 of the new law is set out in the appendix and provides among other things that any investigation, hearing or proceeding instituted or conducted by the State Public Utilities Commission or Public Utilities Commission, shall be conducted and continued to a final determination by the Illinois Commerce Commission with the same effect as if this act had not been passed.

Appellants contend that appellee has not complied with the procedure laid down by the Statutes of Illinois, in order to put itself in a position to legally demand any increase of rates, and, therefore, has not exhausted its legislative remedies so as to give a Federal Court jurisdiction upon the theory that the State of Illinois, in the enforcement of its laws, is depriving appellee of its property without due process of law, and denying it equal protection of the law, in violation of the Fourteenth Amendment, for the following reasons:

FIRST: Schedule 1 was filed on the 22nd day of July, A. D. 1919, and became temporarily effective by order of the commission on November 28, 1919 (R. 2-3). Hearings were had thereon pending a final determination. Schedule 2 was filed on the 1st day of April, 1920, by which it was stated that schedule 1 was cancelled (R. 3). Hearings were thereafter had, and on the 31st day of July, A. D. 1920, which was subsequent to the filing of schedule 2 by which schedule 1 was cancelled, the Commission entered a final order which fixed the rates set forth in schedule 1 as fair and reasonable rates (R. 8). This adjudicated all matters covering this territory, so far as appellee was concerned, up to the date of this final order. No petition for rehearing, or no petition setting up a

new and different state of facts was ever filed as provided by section 67 (Appendix). No complaint was ever made by appellee to this order. It was, therefore, binding upon it. The only action that could be taken since July 31, 1920, was voluntary action on the part of the Commission.

SECOND: The appellee has never, at any time since the date of the entry of said final order of July 31st, 1920, filed any new schedule of rates pursuant to section 36 (Appendix).

The order of the Commission attached to the bill of complaint as "Exhibit A" (R. 8) shows that schedule 1 was filed on July 22nd, 1919, to become effective August 1, 1919, and was suspended until December 20, 1919. On November 28th, 1919, the Commission approved an order authorizing this schedule to become effective temporarily until January 31, 1920, and subsequently approved other supplemental orders extending the effective date of the proposed rates until the necessary investigation had been made.

The bill shows that on or about the first day of April, 1920, while Rate Schedule I. P. U. C. 1 was temporarily in effect (and before there had been an affirmative finding of the commission, as to the reasonableness of the rates therein contained), appellee, by its predecessor, filed a second schedule of rates for the same territory, effective May 1, 1920, and designated as I. P. U. C. No. 2, cancelling I. P. U. C. No. 1. The Public Utility Law of Illinois does not permit or enable appellee to carry on two rate hearings for the same locality at the same time (Sec. 36, Appendix), and the filing of rate schedule 2 prior to a final order being entered on schedule 1 amounted to an amendment of schedule 1, or it can-

celled schedule 1, or became consolidated with it, so that after April 1st, 1920, there was only one proceeding pending before the Commission.

The order of the Commission (R. 13) entered on July 31, 1920, contained the following finding:

> "That the Schedule of Rates known as I. P. U. C. No. 1 of the Central Union Telephone Company, applying to Peoria and vicinity, is just and reasonable, and should be approved."

This order finding that the rates fixed in schedule 1 were just and reasonable was a determination by the Commission that the rates in schelule 2, cancelling rates in schedule 1, which appellee was trying to put into effect as of May 1, 1920, were unreasonable, and such decision disposed of schedule 2, and no further proceedings with reference to schedule 2 could be legally had by the Commission.

This same order shows that the last hearing by the Commission prior to the entry of said final order on July 31, 1920 (R. 8), was held on May 18, 1920, and that the Central Union Telephone Company, predecessor of appellee, was represented by counsel. Schedule 2, cancelling schedule 1, had been filed by appellee on April 1, 1920, almost two months before this last hearing, and any additional reasons for applying for an increased rate over schedule 1 must have been presented to the Commission and taken into consideration by it before the entry of said final order disposing of both of these schedules.

Appellee has never filed any rate schedule or legal application for an increase in rates since the final order was entered on schedules 1 and 2 on July 31, 1920, and, therefore,

has never been in a position to legally demand any action on the part of the Commission. All of the proceedings or actions therein set forth after the final order was entered on July 31, 1920 (R. 3-4), were simply voluntary on the part of the Commission and upon its own initiative as provided by section 36, in which the appellee had no legal vested rights whatsoever. It must comply with the provisions of the Utility Law before it can legally demand that the Commission act.

If schedule 2 cancelled schedule 1 as appellee alleges and contends, then the order of July 31, 1920, certainly was final as to both of them, and if this is true, the Commission was not legally bound to hold hearings after that date.

If schedule 2 cancelled No. 1 the final order as to schedule 1 could operate on nothing but schedule 2.

Appellee cannot now claim that it is entitled to demand any consideration under schedule 2 nor can it base a charge of deprivation of property without due process of law on such facts as these.

The order of the Commission entered on July 31, 1920 (R. 8), shows that schedule 1 was filed on July 22, 1919, and at the request of appellee, was made temporarily effective on November 28, 1919. On March 31, 1920, appellee filed schedule 2 which, as pointed out, amounted to an amendment of schedule 1, took the place of or was consolidated with schedule 1, and the final order entered on July 31, 1920, disposed of both of these schedules. The order of the Commission of July 31, 1920, shows without question that the Commission conducted full, complete and impartial hearings as to these rates. There

is absolutely no statement in the bill of exhibits that would show a change of circumstances or conditions on which an increase of rates could be based, as requested in schedule 2, in the short time intervening between the filing of schedule 1 and schedule 2, and the order of October 31, 1921 (R. 14), by the Commission shows conclusively there never was a basis for schedule 2. If schedule 1 represented a fair increase at the time the final order was entered on July 31, 1920, to which no objection was made by appellee, then schedule 2 was either not properly filed during the pendency of the proceedings on schedule 1, or was an amendment of or became consolidated with schedule 1, and was disposed of by the final order of July 31, 1920, as long as there is no provision in the Utility Law of Illinois for carrying on two rate cases for the same territory at the same time.

No claim is made that appellee made any objection to the order entered on July 31, 1920, or that it has ever applied for a rehearing or made any attempt to have it rescinded, altered or modified, as provided by section 67 of the Utility Law. This section provides that—

> "After any order has been made by the Commission any party to the action may apply for a rehearing in respect to matters determined in the action or proceeding, and the Commission may grant and hold such rehearing, if in its judgment sufficient reason appears."

It cannot be assumed that the Commission on proper application for a rehearing would have denied appellee such relief. If new conditions have arisen as appellee claims, these matters should have been submitted to the Commission in the application for rehearing under this same section which provides as follows:

> "If after such rehearing and consideration of all the facts including those arising since the making of a rule, regulation, order or decision, the Commission shall be of the opinion that the original rule, regulation, order or decision, or any part thereof, is in any respect unjust or unwarranted or should be changed, the Commission may rescind, alter or amend the same."

It was undoubtedly the intention of the legislature by this provision, to permit a utility to obtain relief from an order, which not only might have been unwarranted under the evidence, but which had become unjust on account of new conditions or new facts arising after the entry of the same. Appellee certainly cannot ignore the provisions of this section of the Statute and base its case on a change of facts and conditions which it claims existed at the time schedule 2 was filed but has never been submitted to the Commission, as provided by law.

If appellee did not see fit to take advantage of its rights to apply for a rehearing, it still had a remedy which it did not make any attempt to exhaust, and that was to file a new petition under section 67, which provides,

> "Only one rehearing shall be granted by the Commission, but this shall not be construed to prevent any party from filing a petition setting up a new and different state of facts after two years, and invoking the action of the Commission thereon."

Appellee, therefore, had the right to either apply for a rehearing or file a petition after two years setting up the new conditions that it now claims make schedule 1 confiscatory.

Both of the remedies provided by section 67 are legislative, and must be exhausted by appellee before this Court has jurisdiction.

No strained or extraordinary application of the law involved in this case can permit appellee to stand by and ignore the remedies provided by section 67, when the rate fixed by the final order of July 31, 1920, was not confiscatory at the time it was entered and now claim that after new conditions and facts have arisen, of which the Commission had no notice whatever, that the rates fixed had become confiscatory and for that reason, it is entitled to relief in the Federal Courts. A different question might arise if appellee was complaining that the rates fixed by the final order of July 31, 1920, were confiscatory at the time they were approved, or was seeking relief from a rate arbitrarily fixed by the Commission. In this case, however, appellee is endeavoring to obtain relief from rates voluntarily established by itself, which were not confiscatory at the time they went into effect, and which have remained in effect because of appellee's failure to follow the procedure required by the laws of this State to obtain an increase in rates.

The bill alleges that the appellee on September 14, 1922, requested a prompt decision by the Commission on its schedule of rates filed April 1, 1920 (which said schedule was disposed of by the final order of July 31, 1920), and that pending the entry of a final order, a temporary schedule of rates be made effective on less than thirty days' notice (R. 15). This application for a temporary rate was not proper under section 36 of either the old law (appendix) or the new law (supra). Both sections gave the Commission power, for good cause shown, to allow changes without requiring the thirty days' notice provided therein. This request of appellee does not, in any manner, indicate or specify what the rates are to be, nor

does it appear that appellee made any showing whatever before the Commission that would justify such temporary increase. The order of the Commission attached to said bill as "Exhibit D" (R. 15-16) denies the request of appellee without prejudice, which would not have prevented it from filing its proposed changes in accordance with section 36, and making the showing as required therein. Appellee never appeared before the Commission and requested an opportunity to make the showing required by section 36, before a temporary rate could go into effect. The Commerce Commission cannot be charged with arbitrary action in denying this motion when the only showing that appellee made was contained in this motion, which was not even verified or supported by affidavit.

The law is well settled that in order to invoke the jurisdiction of the Federal Court, the rate making process must have reached the judicial stage. This principle was laid down by this Court in the case of *Prentis* vs. *Atlantic Coast Line Company*, 211 *U. S.* 210. The bills in that case were filed to enjoin the members and clerk of Virginia State Corporation Commission from publishing and taking other steps to enforce a certain order fixing passenger rates. The bills allege that the rates in question were confiscatory and violate the Fourteenth Amendment. The Courts of Virginia have legislative powers, and no appeal had been taken by the complainants to the courts of that state, from the orders or rates fixed by the Commission. The Court in its opinion said:

> "Our hesitation has been on the narrower question of whether the railroads, before they resorted to the Circuit Court, should not have taken the appeal allowed to them by the Virginia Constitution at the legislative stage,

so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule. * * * * * *

If the rate should be affirmed by the supreme court of appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the Circuit Court, without fear of being met by a plea of res judicata. It will not be necessary to wait for a prosecution by the commission. We may add that, when the rate is fixed, a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state, and will be the proper form of remedy. * * * * *"

Mr. Chief Justice Fuller, concurring in reversing the decree in this case, but dissenting from the opinion, says:

"In my opinion, a preliminary objection is fatal to the maintenance of these bills. It appears on their face that the appellees did not avail themselves of the right of appeal to the Court of Appeals of Virginia, which was absolutely vested in them by the constitution and laws of the commonwealth. Such an appeal would have brought up the question of the alleged unreasonableness of the designated rate, and appellees cannot assume that the decision of the commission would necessarily have been affirmed. If reversed or changed to meet appellees' views, the whole ground of equity interposition would disappear. In such circumstances it is the settled rule that courts of equity will not interfere. The transaction must be complete, and jurisdiction cannot be rested on hypothesis. A fortiori this must be so where Federal Courts are asked to interfere with the legislative, executive, or judicial acts of a state, unless some exceptional and imperative necessity is shown to exist, which cannot be asserted here.

Moreover, this is demanded by comity, and what comity requires is as much required in courts of justice as in anything else.

"Comity," said Mr. Justice Gray in the leading case of Hilton vs. Guyot, 159 U. S. 163, 40 L. ed. 108, 16 Sup. Ct. Rep. 143, "in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having

> due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."
>
> And, as applied to Federal interference with state acts, the observance of this rule of comity should be regarded as an obligation. It is recognized as such by section 720 of the Revised Statutes."

In the case of *Bacon* vs. *Rutland Railroad Company*, 232 U. S. 134, the bill was filed to restrain the Public Service Commission of Vermont from enforcing an order concerning a passenger station of the company, at Vergennes, which order was alleged to violate the Fourteenth Amendment. A motion was made to dismiss the bill on the grounds that until the appellee had taken an appeal from the order to the Supreme Court of the State, the Federal Courts did not have jurisdiction. The motion was overruled and the defendants not desiring to plead, an injunction was issued as prayed. This Court reviewed the Prentis case (Supra.) and held that before it would apply, it must be established that legislative powers were conferred upon the Supreme Court of the State of Vermont; that inasmuch as the remedy by appeal was purely judicial, complainant had exhausted its legislative remedies and could apply to the Federal Courts for relief.

Appellants contend that in the case at bar, the proceedings before the Commission have not reached the judicial stage, and therefore, under these cases, this Court should not take jurisdiction.

That appellee must resort to its administrative remedies before this Court has jurisdiction, was again held to be the law in the case of Mellon Company vs. Charles McCafferty, as County Treasurer, et al., 239 U. S. 134. In that case a bill was

filed to enjoin the collection of taxes, on the grounds that the result of the assessments made gave rise to such inequality and discrimination as to make the assessments illegal under the State Constitution and Laws, and also repugnant to the equal protection and due process clauses of the Fourteenth Amendment. The lower courts held that the bill stated no equity because it failed to allege the adequate administrative remedies provided by the state law for the correction of wrongful valuation complained of, had been resorted to. It was urged that error was committed by the court below, in its ruling as to the state law since some of the remedies under that law, which it was held should have been resorted to for the purpose of correcting the assessment complained of, were not so available, and that these remedies were not required to be taken, because they would have been unavailing in the view of the nature of the wrong complained of. This Court in dismissing the writ of error for want of jurisdiction, held that the duty to resort to the adequate remedies provided by the state could not be escaped by assuming that if they had been resorted to, the wrong complained of would not have been rectified.

Under this last authority, appellee cannot maintain its bill without showing that it has resorted to the remedies afforded by the laws of this state, and that they have been unavailing, which it has failed to do under any construction most favorable to it.

Under section 36 of the law of 1921, hereinbefore set forth, a schedule of rates filed by the utility in the proper manner, goes into effect thirty days after the proper notice is

given as provided by section 36. The Commission may suspend the rate for not more than one hundred and twenty days beyond the time when such rate would otherwise go into effect, unless the Commission, in its discretion, extends the period of suspension for a further period of not exceeding six months, or in other words, unless the Commission determines what rates are just and reasonable within a period of eleven months from the time the schedule is filed and proper notice given, the rates in that schedule go into effect automatically. Appellee has been under no necessity of waiting for a decision of the Commission for a longer period than eleven months. If the appellee at any time after July 1, 1921, had properly filed an application for an increase of rates, unless the Commission acted on this application within eleven months, no one could have prevented it from going into effect at the end of that time. If on September 14, 1922, when appellee claims that it filed a motion for a temporary rate to be made effective on less than thirty days' notice (R. 15), it had filed an application for an increase of rates, unless the Commission acted, it would have been effective eleven months from that date. It does not seem just that appellee should be permitted to resort to equity for relief, when it had a plain and speedy remedy under the laws of the State of Illinois, which it has not exhausted, nor made any sincere or honest effort to exhaust. From the facts and circumstances, it appears that appellee did not desire to take advantage of the remedy provided by the laws of the State of Illinois, but on the other hand, desired to place the Commission in such a position that the aid of the Federal

Courts could be invoked and, thereby, obtain relief which it could not justly obtain, nor to which it was entitled, under the laws of the State of Illinois.

Assuming that the application of the Appellee to make schedule 2 effective was properly filed and is still pending and undetermined by the Commission, what has it done to secure a decision of the Commission on this application?

The bill alleges that schedule 2 was filed on April 1, 1920 (R. 4), that on the 6th day of June and the 6th day of July, 1922, there were hearings and evidence was introduced by the appellee; that a further hearing was held on the 13th day of September, 1922. The bill does not show which side introduced evidence at that hearing. It does not appear from the bill or any of the exhibits that appellee, since the 13th day of September, 1922, has appeared before the Commission, through its attorneys or agents, and asked for a further setting of the case. All it has done since that date is to make a formal request on September 14, 1922 (R. 15), for a prompt decision, and write a letter on the 5th day of July, 1923, requesting an early hearing of the case. For almost a year prior to filing this bill to enjoin the Commission, appellee has taken no steps whatever to bring the case to a hearing. The bill does not show that appellee has completed its evidence or closed its case. It undoubtedly had not, for its last request on July 5, 1923, was not for a prompt decision as it formerly requested on September 14, 1922, but for an early hearing. If appellee were sincere in its effort to obtain a finding by the Commission schedule 2 it certainly would have not permitted this matter to pend without an objection of any kind or character from July 7, 1922, to September 14, 1922, and from that

date until July 5, 1923, and from that time until the bill was filed in this case on June 18, 1924.

During all of the time from July 31, 1920, until the bill was filed two feeble efforts were made by appellee to obtain a hearing or hearings before the Commission, and after such negligence on its part, it now claims that the State of Illinois is violating the Constitution of the United States, and denying to it equal protection under the law. Appellee has done nothing to obtain relief before the Commission, other than the requests contained in its motion of September 14, 1922 (R. 15), and its letter of July 5, 1923. Would any court or commission draw the conclusion from those two requests that appellee was suffering confiscation of its property, and really desirous of a final determination of the matter under investigation? If appellee, through its many attorneys or agents, would have appeared before the Commission at any time prior to the filing of this bill of complaint, and insisted upon an immediate hearing and offered to make a proper showing that a temporary rate was necessary or that its property was being confiscated, or if appellee had filed a new schedule of rates at any time after July 31, 1920, when the final order was entered disposing of schedules 1 and 2, then upon a refusal by the Commission to act, there might be some merit in appellee's contention that the Commerce Commission of the State of Illinois refused or failed to act.

The bill in this case charges (R. 4):

> "That said Commission has refused and failed and continues to refuse and fail to continue further in said cause, and to determine the issues in said cause, and has refused and failed and continues to refuse and fail to de-

termine whether or not the rates and charges provided in Rate Schedule I. P. U. C. 2 are just and reasonable, and at no time has the plaintiff acquiesced or consented to any delay on the part of the said Commission."

This is the only allegation in the bill of complaint with reference to the action of the Commission, there being no charge that the delay in determining this matter is unreasonable or that the conduct of the Commission has been arbitrary, capricious or wrongful.

Assuming that schedule 2 was properly filed and proceedings had thereon in accordance with the law, even then without an allegation in the bill that the delay in determining the reasonableness of this schedule, is unreasonable, or that the conduct of the Commission has been arbitrary, capricious or wrongful, this Court would not have jurisdiction to restrain the Commerce Commission during the rate making process or during the time it is exercising its legislative powers.

This question was before the Federal Court in the *Wisconsin-Minnesota Light & Power Co.* vs. *Railroad Commission of Wisconsin*, 267 *Fed.* 711. The bill in that case alleged that the plaintiff filed with the defendant commission its petition in July, 1919, asking for an increase of rates in its entire service to thirty-two communities within the State of Wisconsin; that such proceeding was still pending and undetermined except as to three of the communities; that as to those the Commission had acted, awarding an increase of rates which the plaintiff charged to be confiscatory, and that plaintiff has been diligent in making use of every method afforded it under the laws of Wisconsin to obtain the approval of the Commission of such rates as are necessary to enable it to obtain a fair rate on

its property, and has been unable to obtain such permission from the Commission. In its opinion, the Court said on page 719:

> "Now the defendants rest upon these outstanding facts as a sufficient basis for challenging the plaintiff's attempt to resort to equity, in advance of a determination of the very matters comprehended within the bill by the tribunal which the state has constituted for that purpose, and whose jurisdiction the plaintiff has in fact invoked and concedes. We believe the challenge to be well founded, not only in reason and good sense, but rather clearly upon precedent, disclosed in cases like Prentis vs. Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, and Bacon vs. Rutland Railroad Co., 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538, and, as it is not claimed in the case before us that the delay in determining fully the pending petition before the Commission is unreasonable, or that the conduct of the Commission has been arbitrary or capricious, the authority of such cases is controlling, with respect to equitable interference pending legislative or administrative procedure by a duly constituted tribunal. * * * * *

The Court continues on page 720:

> "If, therefore, we assume that the plaintiff in this case invoked the jurisdiction of the State Railroad Commission for the broad purpose of considering and revising its rates as disclosed by itself in the petition filed in July, 1919, it would be anomalous to recognize the constant alternative of resorting to equity merely if, because of delay, disappointment in partial determination, or for other considerations, the further prosecution, or the awaiting of the final result of, the commission proceedings, was no longer desirable. And it is equally true that if, as suggested by plaintiff's counsel upon hearing of the present motion, a plaintiff may always resort to the Federal equity courts for the mere purpose of challenging as confiscatory, a rate or rule established by a state commission, it must follow that preliminary injunctions, when having no other support than the claim made by a plaintiff in the case like this, will prove a means of perpetually tying up the functioning of the state laws.
>
> The whole question arises, as we view it, not as one

of comity, but rather one of fact, in establishing the proposition that the state, through its tribunals, has committed, or is threatening to commit, aggression upon the complainant's property or property rights. Taking the broad case made by the plaintiff's bill, it is not that the rates originally fixed are now confiscatory, and that the state, through the defendant commission, adheres to them and refuses to give consideration to the facts recited in the bill; for the plaintiff has availed itself of the jurisdiction furnished by the state to conduct an inquiry into its rates and to award an increase. The plaintiff, except as to the three communities, does not pretend that the commission has denied or will deny all relief which it asks for in its petition. The most that it can claim, upon the broad aspect of its petition and the present bill, is that, if it ultimately prevails, or if it fails upon the issues presented to the commission, and the latter's determination is ultimately condemned by the Court, it will in either event sustain an interim loss. This seems to us to be purely a hypothetical, if not conjectural, basis for invoking the equity jurisdiction. (Prentis vs. Coast Line, supra.)

It clearly eliminates the necessity, ordinarily present in equity upon applications for a preliminary injunction, of a clear showing respecting not only the plaintiff's right, but of the defendants' wrong or aggression. It is one thing to make a clear prima facie showing, and quite another to merely set up the claim and ask that the injunction issue for interim protection because the plaintiff may prevail.

The matter can be presented in another way, through the simple query: Is the plaintiff in the present case disclosing, or attempting to disclose, a denial of, or an aggression upon, its property or property rights by the State, upon the same facts disclosed before the commission or inhering necessarily in the rate complained of; and has the State finally denied the plaintiff's right upon the facts so disclosed? This query, so it seems to us, is expressly answered in the negative by the plaintiff's bill, which, while complaining of the rates existent when its petition was filed in July, 1919, seeks not merely to present to this court the facts which then may have been pertinent, but other facts transpiring since the commencement of the proceedings before the commission upon which it lays, or seeks to lay, great emphasis."

The facts in the foregoing case are very similar to the

facts in the case at bar, and without a clear showing, respecting not only the plaintiff's right, but the defendants' wrong or aggression, this Court should not take jurisdiction.

In the case of *Cumberland Telephone & Telegraph Co.* vs. *Railroad and Public Utility Commission of Teennessee, et. al.*, 287 Fed. 406, the court held that a suspension during the rate making process is an incident to the proper exercise of the rate making process; and where such delay is not unreasonable (and there is no allegation in the bill in this case that it is), the utility is not entitled on the ground that the existing rates which it has established are confiscatory, to be granted an injunction which would permit it to increase the rates thus voluntarily established pending the due and proper exercise of the rate making process.

This Court cannot assume in the absence of a proper showing by appellee, that the delay by the Commission in passing on schedule 2 (even if it was properly filed) was unreasonable, or that the action of the Commission is arbitrary or wrongful. Many valid reasons might be assigned to justify such delay or action of the Commission which would prevent appellee from claiming a confiscation of its property on that account under the Fourteenth Amendment. The only presumption, under the bill and exhibits in this case, that can be indulged in without a showing to the contrary, is that the Commission was proceeding according to law, and whenever appellee places itself in a position to legally demand consideration by the Commission, such consideration will be granted.

We submit that appellee has not made the necessary showing under its bill and exhibits, to give this Court jurisdiction to grant the relief requested.

II.

THE INTERLOCUTORY INJUNCTION AND FINAL DECREE ARE VOID.

It is the contention of appellants that the final decree entered in this cause is void, and we desire to call the Court's attention to the terms thereof so far as the permanent injunction is concerned (R. 33):

> "4. That the defendants, and each of them, to-wit: * * * * * *, and all other persons, be permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents, or employees, to observe and keep in force the rates and charges for telephone service in plaintiff's Peoria exchange, prescribed by its Rate Schedule I. P. U. C. No. 1; and that said defendants, and each of them, and all other persons, be permanently restrained and enjoined from taking any steps or proceedings against plaintiff, its officers, agents, or employees, to enforce any penalties, fines, forfeitures, or any other remedy, either under any statute or otherwise, by reason of the charging or collecting by the plaintiff of higher rates and charges for telephone service in plaintiff's said Peoria exchange, than in said Rate Schedule I. P. U. C. No. 1 provided."

It need not be pointed out that this decree is binding upon not only the parties to this suit, but all other persons, and prevents any of them from in any way protecting their individual rights under any circumstances whatsoever. Certainly the District Court would have no jurisdiction over anyone except the parties to this suit, and any attempt to restrain other persons who are not parties, whose rights the Commission cannot waive, and who have a right to demand that before the Commission acts, it must require appellee to follow the procedure laid down by the laws of the State of Illinois to obtain an increase in rates, is erroneous.

This decree permanently prohibits appellants or any other persons from taking any steps or proceedings against appellee, not only to enforce any penalties, fines, or forfeitures, but expressly prohibits any other remedy, which might be available under the laws of the State of Illinois, by reason of the charging and collecting by appellee of higher rates and charges, than in schedule 1. The force of this decree would be to permit appellee to charge any rate that it might see fit, whether reasonable or otherwise, without interference on the part of the Commission. It absolutely prohibits the exercise of all legislative or rate making powers by the Commission that in any way would affect schedule 2. If the action of the District Court is affirmed by this Honorable Court, the appellee will be protected in charging whatever rates it may see fit, and the Commerce Commission, the Attorney General, and all other persons, affected thereby, will have no recourse except to comply with the provisions of the permanent injunction.

The bill shows that appellee has over fifteen thousand seven hundred subscribers, who would come within the classification of "any other persons" enjoined by the final decree in this cause, everyone of whom would certainly have a right under the law to protect his or her individual rights against an excessive or unreasonable rate that might be arbitrarily fixed by appellee. The decree in this cause takes away, without the privilege of being heard, the rights of these many subscribers.

Appellants therefore respectfully urge:

1. That the filing of schedule 2 by appellee during the pendency of the proceedings on schedule 1 amounted to the substitution of schedule 2 for schedule 1 or a consolidation of

both schedules so that after April 1, 1920, there was only one proceeding pending before the Commission.

2. That the final order of the Commission entered on July 31, 1920, disposed of both schedules 1 and 2 and fixed a reasonable rate schedule for appellee to charge thereafter.

3. That after the entry of the order of July 31, 1920, fixing just and reasonable rates the appellee had the right under Section 36, at any time it saw fit, to file a new rate schedule. If this schedule was suspended, appellee had the right to demand immediate hearings thereon. Appellee filed no new schedule of rates after July 31, 1920, and therefore, did not follow the procedure provided by the laws of the State of Illinois to legally obtain an increase of rates.

4. That such hearings as were had after the 31st day of July, 1920, must be regarded merely as voluntary or taken upon the initiative of the Commission, and not brought about through the filing of any rate schedule by appellee in accordance with the Statutes of the State of Illinois.

5. That because of the fact that rate schedule 2 was disposed of and because of the fact that no new rate schedule was filed after such disposition, appellee has not exhausted its legislative remedies before the Illinois Commerce Commission.

6. That appellee did not file a petition for rehearing, or a petition setting up a new and different state of facts, as provided by section 67 of the Utility Act of the State of Illinois, and, therefore, has not exhausted its legislative remedies under this section.

7. If schedule 2 may be regarded as not disposed of by

the order of July 31, 1920, appellee is still in no position to resort to the Federal Court for the reasons, (a) that it was wholly dilatory and negligent in not procuring a hearing and determination on such schedule by the Commission; (b) there is no allegation of unreasonable delay or an arbitrary or willful refusal to act by the Commission.

8. The interlocutory injunction and final decree are void because they permanently enjoin the Commission or any person from taking any action to prevent an increase in rates and this amounts to a prohibition of the Commission from exercising its legislative power.

Appellants therefore respectfully request that the decree of the District Court be reversed and this case be dismissed.

All of which is respectfully submitted.

OSCAR E. CARLSTROM,
Attorney General of State of Illinois.

HARRY C. HEYL,
Counsel for Appellants.

R. H. RADLEY, and
S. F. McGRATH, of Counsel.

APPENDIX.

PERTINENT SECTIONS OF STATUTES RELIED UPON.

Sec. 36. CHANGE OF RATES.) Unless the Commission otherwise orders, no change shall be made by any public utility in any rate or other charge or classification, or in any rule, regulation, practice or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, except after thirty days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules or supplements stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission, for good cause shown, may allow changes without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate or other charge, or classification, or in any rule, regulation, practice, or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, such proposed changes shall be plainly indicated on the new schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item.

No public utility shall increase any rate or other charge, or so alter any classification, contract, practice, rule or regulation as to result in any increase in any rate or other charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified.

Whenever there shall be filed with the commission any schedule stating an individual or joint rate or other charge, classification, contract, practice, rule or regulation, the commission shall have power, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation, and pending the hearing and the decision thereon, such rate or other charge, classification, contract, practice, rule or regulation shall not go into effect: Povided, that the period of suspension of such rate

or other charge, classification, contract, practice, rule or regulation shall not extend more than one hundred and twenty days beyond the time when such rate or other charge, classification, contract, practice, rule or regulation would otherwise go into effect unless the commission, in its discretion, extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, or others in lieu thereof, which it shall find to be just and reasonable. All such rates or other charges, classifications, contracts, practices, rules or regulations not so suspended shall, on the expiration of thirty days from the time of filing the same with the commission, or of such lesser time as the commission may grant, go into effect and be the established and effective rates or other charges, classifications, contracts, practices, rules and regulations, subject to the power of the commission, after a hearing had on its own motion or upon complaint, as herein provided, to alter or modify the same. Within thirty days after such changes have been authorized by the commission, copies of the new or revised schedules shall be posted or filed in accordance with the terms of section 34 of this act, in such a manner that all changes shall be plainly indicated.

Hurd's Revised Statutes of the State of Illinois, 1917, Chapter 111A, Section 36.

Sec. 67. MODIFICATION OF ORDER OR DECISION—REHEARING.) The commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. Any order rescinding, altering or amending a prior rule, regulation, order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original rules, regulations, orders or decisions.

After any rule, regulation, order or decision has been made by the commission, any party to the action or proceedings, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. An application for rehearing shall not excuse any corporation or person from complying with and obeying any rule, regulation, order or decision or any requirement of any

rule, regulation, order or decision or any requirement of any rule, regulation, order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and consideration of all the facts, including those arising since the making of the rule, regulation, order or decision, the commission shall be of the opinion that the original rule, regulation, order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may rescind, alter or amend the same. A rule, regulation, order or decision made after such rehearing, rescinding, altering or amending the original rule, regulation, order or decision shall have the same force and effect as an original rule, regulation, order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original rule, regulation, order or decision unless so ordered by the commission. Only one rehearing shall be granted by the commission; but this shall not be construed to prevent any party from filing a petition setting up a new and different state of facts after two years, and invoking the action of the commission thereon.

Hurd's Revised Statutes of the State of Illinois, 1917, Chapter 111A, Section 67.

Sec. 88. PENDING ACTIONS AND PROCEEDINGS.) This Act shall not affect pending actions or proceedings, civil or criminal in any count brought by or against the People of the State of Illinois or the Board of Railroad and Warehouse Commissioners, State Public Utilities Commission, or Public Utilities Commission, or by any other person, firm or corporation under the provisions of the Acts establishing or conferring power on the Board of Railroad and Warehouse Commissioners, State Public Utilities Commission, or Public Utilities Commission, nor abate any causes of action arising thereunder, but the same may be instituted, prosecuted and defended with the same effect as though this Act had not been passed. Any investigation, hearing or proceeding, instituted or conducted by the Board of Railroad and Warehouse Commissioners, State Public Utilities Commission or Public Utilities Commission, prior to the taking effect of this Act shall be conducted and continued to a final determination by the Illinois Commerce Commission with the same effect as if this Act had not been passed.

Cahill's Revised Statutes of the State of Illinois, 1921, Chapter 111A, Section 88.